Eisenhower himself insisted that, as the only condition of his writing the book, all publishing rights be vested in Doubleday, so that Eisenhower would not be bothered with such issues. *Id.* at 56a, 62a. Eisenhower never asserted any claim to copyright in *Crusade* – though he did for other books *not* written as works for hire – and John Eisenhower specifically informed petitioner that he and the family did not believe that Eisenhower or his family had any renewal rights, or rights of any kind, in *Crusade*. *Id.* at 71a.

2. Consistent with the parties' agreement, Doubleday registered the copyright to *Crusade* in its own name in 1948, and renewed the copyright in its own name in 1975. *Id.* at 70a. Doubleday also licensed the exclusive rights to reproduce *Crusade* in video form to Twentieth-Century Fox Film Corporation ("Fox"), which produced an acclaimed television series based on the Book, also called *Crusade In Europe*. *Id.* at 13a. Fox later sublicensed to respondent SFM Entertainment, LLC ("SFM") the right to distribute the *Crusade* series on videocassette, and SFM in turn sublicensed to respondent New Line Home Entertainment, Inc. ("New Line"), the exclusive right to reproduce the television series on home videocassette. *Id.*

3. In 1995, petitioner produced and began distributing a nearly-verbatim copy of the series on its own videocassettes, called *Campaigns In Europe* ("*Campaigns*"). *Id.* As petitioner concedes, its series "included much of the narration from the television series, and hence much of the text from Eisenhower's book." Pet. 8. This action followed.

C. Proceedings Below

The initial complaint filed in this case alleged that *Campaigns* infringed Fox's exclusive rights to copy and distribute *Crusade* in video form. An amended complaint added a claim under the Lanham Act, asserting that petitioner falsely represented the origin of *Campaigns* by holding itself out as the sole creator of the series.

After extensive discovery, the district court granted respondents' motion for summary judgment, finding petitioner liable both for copyright infringement and for misrepresenting the origin and nature of *Campaigns*. The Ninth Circuit affirmed the Lanham Act ruling but reversed summary judgment on the copyright claim, finding a disputed issue of fact as to whether Eisenhower intended *Crusade* to be written as a work for hire. This Court subsequently reversed the Lanham Act ruling, but did not address any aspect of the remanded copyright claim. *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 28 n.2 (2003) ("The copyright issue is still the subject of litigation, but is not before us. We express no opinion as to whether petitioner's product would infringe a valid copyright in General Eisenhower's book.").

On remand, the district court conducted the trial and fact-finding required by the court of appeal. After hearing testimony from Eisenhower's longtime personal assistant – petitioner called no witnesses – and reviewing an extensive documentary record, including much written in Eisenhower's own hand, the district court answered the question left open by the summary judgment record: Eisenhower clearly intended Doubleday to own the initial copyright in *Crusade* as the proprietor of a work for hire. To assess the parties' intent, the court applied the approach followed by every circuit that has considered whether a work produced by a person other than a traditional employee is a work for hire. Under that approach, any clear expression of the parties' intentions governs – as it obviously must – but in the absence of clear evidence as to what the parties actually intended, the court presumes that the parties intended that the person who motivated and paid for the production of the work would own the initial copyright as proprietor of a work for hire. Pet. App. 72a-85a.

In this case, the district court found substantial evidence that the parties actually intended Doubleday to own the

copyright as statutory author: not only was *Crusade* written at Doubleday's instance and expense, but significant documentary evidence – including Eisenhower's own words – confirmed that Eisenhower did not want to own any publishing rights at all in the Book. *Id.* at 53a-71a.

On a second appeal, the Ninth Circuit affirmed. The court rejected petitioner's claim that *Crusade* "cannot be a work-for-hire" simply because Eisenhower "authored the book as an independent contractor" and thus "Doubleday was not his 'employer.'" *Id.* at 17a-18a. The court noted that petitioner's argument would "overturn forty years of established case law" in the Ninth Circuit and contradicts decisions in numerous other circuits rejecting the same argument. *Id.* at 19a. The court further held that, as a matter of fact, the record amply supported the district court's finding that Eisenhower and Doubleday actually intended *Crusade* to be a work for hire, "where General Eisenhower need never be concerned with the rights to the book." *Id.* at 28a. Judge Nelson dissented, arguing that the record did not support the district court's factual determination as to the parties' actual intent, but she did not question the court's holding that the 1909 Act is now properly interpreted as permitting the creation of works-for-hire by independent contractors when the facts do show that the parties actually intended such a result. *See id.* at 36a.

Petitioner sought en banc review, limited to petitioner's theory that the Act's use of the term "employer" categorically precludes creation of a work for hire by any independent contractor under any circumstances. The en banc petition was denied, with no judge requesting a poll. *Id.* at 4a. This petition followed.

REASONS FOR DENYING THE PETITION

A. The Court Of Appeals' Decision Applies Long-standing, Settled Law And Conflicts With No Decision Of This Or Any Other Court

1. Petitioner concedes that the decision below applies a legal rule – an independent contractor may produce a work-for-hire under the 1909 Act in certain circumstances – that is firmly settled in the lower courts: "All courts of appeal which have addressed the matter now subscribe to the view [followed by the decision below]." Pet. 19 (citing decisions from the First, Second, Fourth, Fifth, Seventh, Eleventh and D.C. Circuits); *see id.* at 3 (noting that rule is "received wisdom" in all courts). Moreover, as petitioner acknowledges, this understanding of the 1909 Act's work-for-hire provision "took firm hold" in the circuits more than 30 years ago. *Id.* at 17. Petitioner gamely pretends that the total lack of any controversy in the lower courts over the issue presented is a reason to *grant* certiorari, *id.* at 21, but petitioner well knows the opposite is true.

2. Lacking any remotely plausible circuit conflict on which to rest its case for certiorari, petitioner tries to manufacture a conflict with this Court's decisions. This strategy is, of course, standard fare for petitioners who lack any serious basis for review of an adverse decision, but it satisfies this Court's stringent test for certiorari only in rare circumstances:

> Lawyers . . . are likely to regard any case they have lost in a lower court as necessarily in conflict with some Supreme Court decision or doctrine; that is what makes the ruling below arguably "erroneous." But such a loose reading of the Rule 10(c) reference to a decision "in conflict with applicable decisions of this Court" does not satisfy the Court's own understanding of what constitutes a conflict of this nature. To justify a grant of certiorari, the conflict must truly

> be direct and must be readily apparent from the lower court's rationale or result.

Robert L. Stern, et al., *Supreme Court Practice* 233 (8th ed. 2002). The asserted conflict in this case is neither truly direct nor readily apparent – it is utterly nonexistent.

According to petitioner, this Court's precedents have adopted a "rigidly enforced regimen" for interpreting the word "employer" as it appears in federal statutes. Pet. 4. The word is to be interpreted according to its common-law meaning, and, petitioner claims, this Court's precedents uniformly hold that the common-law meaning of "employer" categorically excludes a person who commissions work from an independent contractor. *Id.* at 4, 10-15.

But no such precedents exist. As careful scrutiny of the petition reveals, every single case cited as "instruct[ing]" courts to "exclude commissioning relationships when interpreting 'employer'" in federal statutes (*id.* at 21) is actually instructing courts in the proper interpretation of the distinct term of art "employee." *See, e.g.*, *id.* at 12 ("This Court has relied on the common-law test to distinguish between 'employee' and 'independent contractor' in construing '*employee*' in several statutes." (emphasis added) (citing cases exclusively construing 'employee"); *id.* at 14 ("In other contexts the Ninth Circuit acknowledges that 'we are directed by Supreme Court precedent to apply the common law definition of the term '*employee*.'" (emphasis added) (quoting *Guthart v. White*, 263 F.3d 1099, 1105 (9th Cir. 2001)); *id.* at 15 n.6 (citing six precedents, all construing the word "employee").

As this Court's cases have made clear, the word "employee" does indeed have a distinct common-law understanding, one generally defined by the master-servant test applied in agency law, which distinguishes "employees" from "independent contractors." *See Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 325 (1992). But contrary to

petitioner's bald assertion, this Court's cases have *never* construed the "cognate" word "employer" as excluding an independent contractor relationship. The reason is simple: as every leading common-law authority recognizes, *the word "employer" includes a person who hires an independent contractor*:

- The *Restatement (Second) of Torts* devotes an entire chapter to the "Liability of an *Employer of An Independent Contractor*." Restatement (Second) of Torts ch. 15, §§ 409-429 (1965) (emphasis adedd).

- The classic 19th century common-law treatise *Thompson on Negligence* defined an "independent contractor" as "'one who renders service in the course of an occupation, representing the will of his *employer* only as to the result of his work, and not as to the means by which it is accomplished.'" *Gayle v. Missouri Car & Foundry Co.*, 76 S.W. 987, 992 (1903) (emphasis added) (quoting treatise); *Jahn's Adm'r v. Wm. H. McKnight & Co.*, 78 S.W. 862, 863 (Ky. 1904) (same).

- Common-law precedents contemporaneous with the 1909 Act routinely describe the person who hires an independent contractor as the "employer" of the independent contractor.[1]

- The chapter of the common-law cyclopedia *American Jurisprudence* addressing "Independent Contractors" refers throughout to the hiring party as the "employer" of the independent contractor. *See, e.g.*, 41

[1] There are too many to cite in full, but a sample includes those just cited, as well as *De Forrest v. Wright*, 2 Mich. 368, 369-70 (1852); *State v. Swayze*, 18 A. 697, 697-98 (N.J. 1889); *Hexamer v. Webb*, 4 N.E. 755, 758 (N.Y. 1886); *City of Tiffin v. McCormick*, 34 Ohio St. 638, 642 (1878); and *Rogers v. Florence*, 9 S.E. 1059, 1061 (S.C. 1889).

Am. Jur. 2d *Independent Contractors* §§ 8, 14, 19, 47 (2005).

- The *Restatement (Second) of Agency* defines an "independent contractor" as a "person[] for whose conduct . . . the *employer* is not responsible except in the performance of nondelegable duties." Restatement (Second) of Agency § 2 cmt. b (1958) (emphasis added).

Even more significant for present purposes, this Court's own decisions have *repeatedly* referred to the person who hires an independent contractor as an "employer." These include decisions issued in the common-law era, *see Robbins v. Chicago City*, 71 U.S. (4 Wall.) 657, 666-67 (1867) ("Few persons possess the skill to build a house. A particular class of persons must, to a greater or less degree, be intrusted with the execution of such a work. And the more completely the execution of it, and the manner of doing it, are placed by the employer in the hands of skilful and independent contractors, the more fully has he performed his duty to the public."); *St. Paul Water Co. v. Ware*, 83 U.S. 566, 576-77 (1872), and a decision issued well after *Darden*, *see Meyer v. Holley*, 537 U.S. 280, 290 (2003) (referring to liability "the law might impose in certain special circumstances upon a principal or employer that hires an independent contractor").

It is thus hardly "folly" or a "bizarre polarity" to state that Doubleday was Eisenhower's "employer" even though Eisenhower was not Doubleday's "employee." Pet. 20. Doubleday "employed" him as an independent contractor – a perfectly common word usage. It is petitioner's folly to ignore the use of the word "employer" in the relevant common-law authorities and decisions of this Court.

2. Instead petitioner relies primarily on two decisions of this Court ostensibly holding – in the face of the authorities just cited – that "[t]he common law conception of the word 'employer' excludes commissioning relationships" (Pet. 4):

Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440 (2003) and *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989) ("*CCNV*"). Unsurprisingly, neither case holds anything such thing.

In the single footnote petitioner repeatedly cites from *Clackamas* (Pet. 4, 12), the decision merely quotes at length *Darden*'s "common-law test for determining whether a hired party is an *employee*." 538 U.S. at 445 n.5 (emphasis added). To the extent the remainder of the decision addresses the concept of "employer," it is simply to distinguish that concept from an "employee," because the issue in the case was whether a shareholder-director is an "employer" or an "employee." The very footnote petitioner cites makes clear that the case has nothing to do with "drawing a line between independent contractors and employees." *Id.*

Petitioner's use of *CCNV* is even more improper. According to petitioner, *CCNV* holds that "under the common law 'employer' refers to 'the conventional master-servant relationship as understood by common-law agency doctrine.'" Pet. 4 (quoting 490 U.S. at 739-40). But the quoted passage from *CCNV* actually says this: "[W]hen Congress has used the term *'employee'* without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." 490 U.S. at 739-40 (emphasis added). *CCNV* is thus consistent with *Darden* and every other case cited in the petition: it holds that the common-law term of art "employee" refers to the master-servant relationship, but says nothing whatsoever about the common-law meaning of the broader term "employer."

Petitioner suggests otherwise, but cannot bring itself to make such an absurd reading of *CCNV* openly. Petitioner thus tries to hide in a parenthetical its only support for the most critical passage in the entire petition, *viz.*, that "[t]he cognate 'employer' has the same meaning" as "employee,"

presumptively connoting a master-servant relationship. Pet. 12. But, again, the quote petitioner provides from *CCNV* says no such thing: "when we have concluded that Congress intended terms such as 'employee,' 'employer,' and 'scope of employment' to be understood in light of agency law, we have relied on the general common law of agency, rather the law of any particular State, to give meaning to these terms." *Id.* (quoting *CCNV*, 490 U.S. at 740-41). At most this passage says the general common law of agency is to give meaning to the term "employer" – and as shown above, the general common law authorities clearly hold that the term" employer" includes one who hires an independent contractor. In any event the passage does not even state that general agency law principles must always give meaning to the term "employer" – it says only that such principles must govern *over the law of any particular State*, in those situations where agency law is applicable at all. And in none of the cases cited in *CCNV* did the Court actually construe the term "employer" – every case involved the word "employee" or the phrase "scope of employment."

Of course, if the Court's precedents did dictate application of agency law to construction of the term "employer," then it would naturally include independent contractor relationships, as explained above. Every court has construed the 1909 Act's work-for-hire provision consistently with the common-law definition of "employer," in other words.

Petitioner's other effort to suggest that *CCNV* actually construes the word "employer" is relegated to a footnote, where petitioner simply states that *CCNV* "in reality construed 'employer' as well as 'employee.'" Pet. 20 n.8. But as support for this seemingly critical proposition, petitioner cites only page 732 of the *CCNV* opinion, which consists of nothing more than the introductory paragraph of the opinion describing the issue presented. The word "employer" appears nowhere in the paragraph. Nor does any other aspect

of *CCNV* address the proper construction of the word "employer" under the 1909 Act or any other statute, or suggest in any way that the term excludes the employment of an independent contractor.

The reality is that petitioner does not and cannot cite any decision of this Court contradicting the many common law authorities holding that an "employer" may "employ" an "independent contractor." The decision below, like every other circuit court decision to have addressed the issue, is fully consistent with the common law use of the term "employer" and consistent with the decisions of this Court.[2]

B. The Settled Construction Of The 1909 Act's Work For Hire Provision Does Not Reflect Unsound Or Impermissible Copyright Policy

Petitioner purports to disdain "policy-oriented techniques" for construing the word "employer" in federal statutes. Pet. 21. But on the very next page, petitioner – having roundly ignored the common-law authorities that should be the heart of its argument – launches a set of purely policy-based attacks on the settled judicial construction of "employer" in the 1909 Act work-for-hire provision. Pet. 22-25.

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[2] Contrary to the amicus brief submitted by Malla Pollack, the 1976 Act's distinct work-for-hire provision casts no doubt on the settled, pre-existing construction of the 1909 Act's provision. If anything, the 1976 amendment confirms the preexisting doctrine under the 1909 Act, by codifying the existing policy that independent contractors may be employed to create works for hire. The difference is that the 1976 Act explicitly codifies a distinction between works made by "employees" and those made by independent contractors, and narrows the circumstances under which works made by the latter will be deemed works for hire. Nothing about the text or history of the 1976 Act indicates that the word "employer" in the 1909 Act excludes works made by independent contractors, or that Congress intended to *expand* the circumstances under which works for hire can be created, by opening the field up to previously excluded independent contractors.

Those attacks are not only misplaced for the reason petitioner itself cites, they are also substantively incorrect.

Petitioner's main policy critique is the conclusory observation that "transforming a commissioned work into a work for hire 'unduly protects the employer's entrepreneurial idea at the expense of the artist's creative labor.'" Pet. 16 (quoting *Dumas v. Gommerman*, 865 F.2d 1093, 1096 n.5 (9th Cir. 1989)).[3] But it is hardly clear why the balance is automatically unfair to the artist. As Judge Friendly explained in the "famous[]" opinion petitioner cites (and misunderstands), Pet. 25, in the situation of an "independent contractor commissioned to create a work of art," it is "not unreasonable to assume in the absence of contrary proof that the parties expected the purchaser to wind up owning the work lock, stock, and copyright and that the artist set his price accordingly." *Scherr v. Universal Match Corp.*, 417 F.2d 497, 502 (2d Cir. 1969) (Friendly, J., dissenting); *see also May*, 618 F.2d at 1368 (quoting Judge Friendly's formulation). And because "economic philosophy behind the [Copyright] [C]lause . . . is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors," *Mazer v. Stein*, 347 U.S. 201, 219 (1954), allowing an independent

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[3] Petitioner is much impressed by the fact that this brief observation appeared a Ninth Circuit decision, as if this single footnote reflected grave doubts within the circuit about the wisdom of its rule. In fact, the quoted statement is merely describing the basic reason Congress decided to adopt a *new* rule for the 1976 Act's work-for-hire provision, which itself allows commissioned works to be "transformed" into works for hire, despite the artist's own "creative labor." The new rule shifted the balance, in other words, but it did not outright preclude the creation of works for hire by independent contractors, and nothing in *Dumas* suggests that such a concept is inherently "abhorrent," as petitioner contends (Pet. 16). Indeed, as explained in the text, the Ninth Circuit later endorsed Judge Friendly's explanation of the policy virtues of rebuttably presuming that a work inspired and funded by another was intended to be a work for hire.

contractor to in effect "sell" his full authorship rights to obtain a higher price for his creative labor is wholly consistent with the constitutional policies underlying copyright law, as Judge Friendly recognized, *see Scherr*, 417 F.2d at 502.

Certainly nothing in Judge Friendly's *Scherr* opinion supports petitioner's preposterous suggestion that the long-standing construction of the 1909 Act's work for hire provision might render the provision unconstitutional. No court anywhere has ever cast doubt on the constitutionality of the 1909 Act work-for-hire provision as it has long been construed. Petitioner's entire constitutional argument relies on a single sentence in Judge Friendly's dissenting opinion in *Scherr*, but petitioner badly misunderstands that sentence. Judge Friendly observed only that the Constitution might not allow Congress to "grant employers the exclusive right to the writings of employees *regardless of the circumstances*." *Scherr*, 417 F.2d at 502 (emphasis added). As the italicized phrase indicates, Judge Friendly merely emphasized that Congress may not be able to make all works created by "employees" *automatically* works for hire. The next sentence clarifies his point: "[I]n order to be constitutionally viable, [§] 26 must be limited to instances where an assignment of future copyright *may fairly be implied*." *Id.* (emphasis added). Judge Friendly then goes on to explain why it *is* fair to infer that an independent contractor commissioned to create a work intended to vest the copyright in the commissioning party: absent contrary evidence, it may be presumed that the artist "set his price" to reflect the work-for-hire copyright vesting. *Id.* This case illustrates Judge Friendly's point: overwhelming evidence confirms that Eisenhower set his price for writing *Crusade* on the explicit assumption that he would *not* possess any rights of any kind in the published work. *See, e.g.*, Pet. App. 28a, 56a. Respect for the artist's freedom to negotiate his own beneficial economic arrangement is exactly why Judge Friendly believed that the rule

followed by the decision below reflects valid and constitutional copyright policy. *See Scherr*, 417 F.2d at 502.[4]

C. Petitioner's Policy Arguments Are Properly Directed To Congress

To say that the policy reflected in the 1909 Act's work-for-hire provision is sound is not to say, of course, that it is the only conceivable copyright policy Congress could adopt. And in the 1976 revision to the Act, Congress did indeed decide to adopt a revised approach to work-for-hire for newly created works. But Congress did not outright bar commissioning parties from assuming copyrights as proprietors of works-for-hire on the ground – asserted as constitutional imperative by petitioner here – that commissioning parties are worthless and that only actual creators deserve copyright protection. To the contrary, Congress made clear that independent contractors *can* be commissioned to create works-for-hire, so long as their intent to vest copyright in the commissioning party is expressed in writing.

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[4] Other than misplaced reliance on Judge Friendly's *Scherr* opinion, petitioner's only support for its frivolous constitutional argument is the lazy insult that those who motivate and fund creative works by independent contractors are a bunch of "untalented movers and shakers." Pet. 24. The factual basis for this claim is a mystery, but even if there were any merit to it, petitioner does not even attempt to explain why an employer of an "employee" is necessarily more talented or creative than an employer of an independent contractor. (Indeed, a person who affirmatively seeks out the creation of a particular work by a particular person is more likely to have his or her own creative vision than is the master of a hundred servants producing, say, corporate ad copy.) If the personal creativity of the employer is all that matters, in other words, then *any* work-for-hire provision would be invalid. Petitioner concedes that its point proves this much – which is far too much – citing a law review article questioning the constitutionality of *all* work for hire concepts. Pet. 25 n.9. Petitioner's view that employers are all untalented hacks does absolutely nothing to show how the 1909 Act should have been construed to allow only the involuntary creation of works-for-hire by employee drones, but not the voluntary creation of works for hire by specially commissioned independent contractors.

Notably, however, Congress did not make that change with respect to works created under the 1909 Act – even though, by the time of the 1976 Act, the "instance and expense" presumption for assessing the intent of parties to an independent contractor relationship test had become firmly rooted doctrine in the courts. Pet. 17. If Congress believed the courts' interpretation of the 1909 Act was wrong, and upset the carefully balanced expectations of parties operating under that statute, Congress easily could have amended the work-for-hire provision of the old Act for works still governed by that statute. Yet Congress not only declined to "correct" the courts' construction of the 1909 Act's work-for-hire provision in the 1976 overhaul, it has repeatedly declined to do so in subsequent amendments to the statute as well. *See, e.g.*, Work Made for Hire and Copyright Corrections Act of 2000, Pub. L. No. 106-379, 114 Stat. 1444; Copyright Term Extension Act of 1998, Pub. L. No. 105-298 § 102, 112 Stat. 2827; Copyright Renewal Act of 1992, Pub. L. No. 102-307 § 102, 106 Stat. 264.

Congress's longstanding acquiescence in the courts' even longer-standing approach to work-for-hire under the 1909 Act, while perhaps not decisive in and of itself, deserves substantial respect. *See Monessen Sw. Ry. Co. v. Morgan*, 486 U.S. 330, 338 (1988) ("we have recognized that Congress' failure to disturb a consistent judicial interpretation of a statute may provide some indication that Congress at least acquiesces in, and apparently affirms, that interpretation" (alterations and internal quotation marks omitted)). After all, "it is Congress that has been assigned the task of defining the scope of [rights] that should be granted to authors or to inventors in order to give the public appropriate access to their work product." *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984). Now that the lower courts have conclusively determined that the 1909 Act defined the scope of authorship rights to include the commissioning of works by independent contractors – and for decades private

parties have developed economic expectations around that settled rule – this Court should not intervene to revise that policy and imprint a radical new one onto the statutory text.

If Congress believes the courts should be interpreting the term "employer" in the 1909 Act contrary to its accepted common-law meaning as including the employer of an independent contractor, Congress can amend that statute, and decide for itself how to address the major reliance problems and transition issues that such policy reversal would entail, as discussed in the next section.

D. Reliance Interests Counsel Against Intervention By This Court

The expectations and reliance interests formed around the longstanding judicial interpretation of the 1909 Act's work-for-hire provision militate strongly against intervention by this Court. For decades, owners of copyrights in works-for-hire created by independent contractors have operated under the assumption that their renewed copyrights are valid. Many of these works – such as *Crusade* – have significant value not only to their copyright proprietors, but to many others as well. As this case illustrates, deals have been made, rights have been licensed and sublicensed, and products have produced, all on the expectation that underlying copyrights remain valid.

A sudden reversal of the rule applied below would instantly destroy all those expectations. It would plunge an untold number of works into the public domain, with no notice or compensation to those who have organized economic affairs work-for-hire copyrights they thought were properly renewed. Licensing deals would be have to be unwound, and book or video runs would have to be canceled, as the economic value of exclusivity suddenly evaporated.

Petitioner ignores all those reliance interests, arguing gamely that reliance interests actually favor an abrupt rejec-

tion of the decades-long understanding of the 1909 Act work-for-hire provision. But the reliance interests petitioner cites pale by comparison to those discussed above, if they exist at all anymore. The reliance interest petitioner cites are those of independent contractors who, before the mid-1960s, were paid to create works on commission, and who relinquished copyrights upon creation of the work without making sufficiently clear that they actually expected to retain a family reverter renewal right down the road. But the fact is that there is *no person with such reliance interests living today*: this issue arises only when the creator of the work *has already died*, because an assignee of a copyright may renew while the creator is alive. *Stewart v. Abend*, 495 U.S. 207, 219-20 (1990). So at best the reliance interest asserted by petitioner can inhere only in some surviving family member of such a person somewhere, chafing because someone else renewed a copyright a deceased relative relinquished long ago. And there are almost certainly no such persons out there either, inasmuch as any dispute over ownership of the renewal right would have arisen at the time of renewal.[5]

The real reliance interests in this case are those that have arisen around seemingly valid copyrights – interests with tangible and significant value, involving real and identifiable people, and actual, ongoing business transactions. Those interests unambiguously favor maintaining the existing 1909 Act work-for-hire legal regime, which is – as even petitioner concedes – clear, settled and uniform.

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[5] The Pollack brief cites the interests of those who would exploit "orphaned" works, i.e., works whose copyright owner cannot be identified. Pollack Br. 6-7 & n.4. But this case has nothing to do with "orphaned works" – the owner of a renewed copyright is perfectly easy to identify from the renewal registration. And because the rule at issue here is already settled and clear, there is no existing doubt as to the legitimacy of that ownership.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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No. 05-1259

In the Supreme Court of the United States

DASTAR CORPORATION,

Petitioner,

v.

RANDOM HOUSE, INC., TWENTIETH CENTURY FOX FILM CORPORATION, SFM ENTERTAINMENT, LLC AND NEW LINE HOME VIDEO INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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STATEMENT PURSUANT TO RULE 29.6

Dastar's corporate disclosure statement was set forth at page ii of the Petition for a Writ of Certiorari, and there are no amendments to that statement.

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I. THE "INSTANCE AND EXPENSE" TEST CONFLICTS WITH THE COURT'S INTERPRETATION OF "EMPLOYER."

A. The Court Construes "Employer" in Tandem With Other "Employ" Cognates.

Respondents persist in their quixotic position that "employer" and "employee" are not complements. But their theory flies in the face of this Court's decisions and common sense alike. Pet. at 19-21. Despite the opposing brief's length and tone, the position remains untenable.

Respondents excerpt a treatise discussing conflicts between circuit decisions and precedents of the Court. Br. Opp'n at 9-10. What the excerpt omits shows that the clash between the "instance and expense" test and this Court's jurisprudence is a proper basis for plenary review: "A direct conflict between the decision of the court of appeals of which review is being sought and a decision of the Supreme Court is one of the strongest possible grounds for securing the issuance of a writ of certiorari." R. Stern et. al, SUPREME COURT PRACTICE 232 (8th ed. 2002)(emphasis added). Because lower courts generally do not explicitly refuse to follow a precedent of the Court, such a conflict need only be "apparent." Id., at 232-33.

Asserting that the "apparent" conflict is illusory, respondents boldly pronounce that "no precedent of this Court – not one – has ever held that the word 'employer' excludes a person who employs an independent contractor." Br. Opp'n at 1 (emphases in original). In fact every relevant decision does what respondents say the Court has never done. Correlatively, the Court has never endorsed respondents' expansive interpretation.

• Respondents assert that CCNV v. Reid, 490 U.S. 730 (1989), "holds that the common-law term of art 'employee' refers to the master-servant relationship, but says nothing whatsoever about the common-law meaning of . . . 'employer.'" Br. Opp'n at 13. In reality CCNV, which construed work for hire legislation, is telling evidence that the Court construes cognates of "employ" in lockstep.

In CCNV the Court granted certiorari to resolve a conflict "over the proper construction of the 'work for hire' provisions" – in the plural – of the 1976 Copyright Act. Id., at 736. The Court framed its task by stating "we must construe" §§101 and 201(b) of the statute. Id., at 732. "Employee" and "scope of employment" appear in §101 (a work is "for hire" if it is "a work prepared by an employee within the scope of his or her employment"), id., at 738, and "employer" appears in §201(b)(in regard to a work for hire "the employer or other person for whom the work was prepared is considered the author"). Id., at 737.

Br. Opp'n at 14 discounts the Court's outline of the scope of the case as "nothing more than the introductory paragraphs of the opinion describing the issue presented." But the fact that the outline appeared near the beginning of the opinion is not a reason to reject the Court's own statement of what it "must construe."

Further, CCNV proceeded to consider the meaning of not just "employee," but also "employer" and "scope of employment," as promised. It construed the three statutory variants of "employ" mutatis mutandis, in the same manner

that all "terms such as" them must be construed. Id., at 740.[1] The result was a narrow common law "reading of the undefined statutory terms" -- in the plural. Id., at 743 (emphasis added). The "statutory terms," the Court held, denote "the conventional relation of employer and employee," id., at 740, or the "employment relationship" in the common law sense. Id., at 752.

• Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318 (1992), also illustrates the Court's practice of reading the cognates in tandem. According to Br. Opp'n at 13, Darden too "says nothing whatsoever about the common-law meaning of . . . 'employer.'" But as with CCNV respondents' cramped reading of Darden is tendentious.

Darden construed Employee Retirement Income Security Act of 1974, 29 U.S.C. §1002(6), which defines "employee" as "any individual employed by an employer." Id., at 323. The opinion observed that this definition is "nominal," "completely circular and explains nothing." Id.

Since "any individual employed by an employer" furnished an unilluminating definition of "employee," Darden relied on the common law of agency in concurrently construing the equally undefined "employee" and "any individual employed by an employer." Id. The decision reiterated the canon that Congress is presumed to intend "an agency law definition for 'employee'" - as defined by reference to "employer" -- "unless it clearly indicates otherwise." Id., at 325.

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[1] For instance, one of the authorities CCNV relied on is Robinson v. Baltimore and Ohio Railroad Co., 237 U.S. 84, 94 (1915), CCNV, 490 U.S. at 740, which so construed "employed."

- A final example is Clackamas Gastroenterology Associates, P.C. v. Wells, 538 U.S. 440 (2003). Br. Opp'n at 13 states that it also is silent on whether "employer" and "employee" have matching meanings. But again respondents' reading cannot be squared with the decision.

Like Darden, Clackamas Gastroenterology Associates, P.C. construed a circular definition of "employee," in Americans with Disabilities Act, 42 U.S.C. §1211(4), which "simply states that an 'employee' is 'an individual employed by an employer.'" Id., at 444. The issue was not "drawing a line between independent contractors and employees," but "whether a shareholder-director is an employee." Id., at 445. As a result, the specific set of common law factors for making the employee/independent contractor distinction was "not directly applicable." Id. The Court applied a somewhat different set of factors to determine "whether a shareholder-director is an employee." Id., at 449. In doing so it interpreted "employee" and "employer" in the statute's circular definition in tandem. Id.

In short, respondents' position would not only "be hard to reconcile with our previous decisions," Dastar Corp. v Twentieth Century Fox Film Corp., 539 U.S. 23, 36 (2003), it is flatly incompatible with them. The "apparent" clash between the "instance and expense" test and the Court's interpretation of "employer" is not an illusion. It cannot be explained away by excising "employer" from the narrow common law construction governing "employee," "scope of employment," "employed" and other locutions in the "employ" family.

B. Respondents' "Counterexamples" Are Inconsequential.

Br. Opp'n 1 trumpets that "every recognized common-law authority uses the term 'employer' to describe the person who hires out work to an independent contractor." (Emphasis in original.) This grandiose coming attraction overbills substantially what the opposing brief delivers.

Br. Opp'n at 11-12 marshals fourteen heterodox uses of "employer" between 1852 and 2005 – less than one per decade. Seven are in musty state court opinions making incidental use of "employer" and stating no legal proposition near what respondents contend. Others are in treatises which limn state tort law.[2]

None of this is germane. Respondents' random collection is not a basis for the Court to abandon its longstanding interpretation of "employer," for three reasons:

First, in establishing "a federal rule of agency," the Court foreswore "reliance on state agency law" long ago. CCNV, 490 U.S. at 740. It continues to rely "on the general common law of agency, rather than the law of any particular State, to give meaning to" cognates of "employ." Id. Not one use on

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[2] Br. Opp'n at 12 states that one of the entries, Restatement (Second) of Agency §2 cmt. b, "defines an 'independent contractor' as a 'person[] for whose conduct . . . the employer is not responsible except in the performance of nondelegable duties.'" But the cited commentary contains no such "definition." It is Restatement §220(2), which lists the nonexhaustive factors for determining whether a person is an "employee" or "independent contractor," that the Court relies on in this regard. CCNV, 490 U.S. at 752.

respondents' list exemplifies or articulates the "federal rule of agency."

Second, to possess a common law meaning a term need not have impossibly pure and exceptionless usage. The common law is "the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken." Morissette v. United States, 342 U.S. 246, 263 (1952). Respondents' statistical approach in which a virtually undetectable variation from 100% uniform usage over a century and a half vitiates the possibility of a common law meaning is unsupportable.[3]

Third, the federal common law meaning of "employer" complementing that of "employee" is established. CCNV expressly approved this result for all cognates of "employ," treating interchangeably the holdings of an array of surveyed decisions interpreting particular cognates. Darden illustrates the continuing vitality of the approach. Respondents do not discuss any of the underlying authorities on which CCNV is built, instead putting forward scattered authorities that do not touch on the content of federal common law.

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[3] Even "employee" has been used in a broad sense inclusive of independent contractors. See National Labor Relations Board v. Town & Country Electric, Inc., 516 U.S. 85, 90 (1995)(dictionary definition includes a "person who works for another in return for financial or other compensation"). This does not mean that the Court's interpretation of "employee" is flawed, nor do respondents so contend.

C. Respondents' Legislative History Is Beside the Point and Incorrect.

Br. Opp'n 15 n.2 posits that Congress, cognizant of the expansionary holdings spawned by Lin-Brook Builders Hardware, chose in the 1976 Act to "codify the existing policy that independent contractors may be employed to create works for hire." There are three difficulties with this argument:

First, it was not raised below, and hence is waived. Sprietsma v. Mercury Marine, 537 U.S. 51, 56 n.4 (2002).

Second, legislative history is beside the point. "When we find the terms of a statute unambiguous, judicial inquiry is complete, except in 'rare and exceptional circumstance.'" Garcia v. United Stattes, 469 U.S. 70, 75 (1984). The common law rule by itself mandates narrow construction of the undefined word "employer." Darden, 503 U.S. at 323.

Third, respondents profoundly disregard the legislative history laid out in CCNV, which recounted that after Congress decided to overhaul the copyright laws in 1955, CCNV, 490 U.S. at 743, it adopted "a historic compromise" reached by the interested groups in 1965. Id., at 746. At that time "the courts had applied the work for hire doctrine under the 1909 Act exclusively to traditional employees. Indeed, it was not until after the 1965 compromise was forged and adopted by Congress that a federal court for the first time applied the work for hire doctrine to commissioned works." Id., at 749. Congress therefore was not cognizant of Lin-Brook Builders Hardware and its progeny when it adopted the new law. It did not codify holdings which were nonexistent.